Petition

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No. _____

In the
Supreme Court of the United States

October Term 1981

RAMOCO INC. and RAM PETROLEUMS INC.

Petitioners,

vs.

JAMES G. WATT, Secretary of the Interior of the United States of America, EDWARD W. STUEBING and DOUGLAS E. HENRIQUES, Administrative Judges of the Interior Board of Land Appeals,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August 24, 1981

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The Petitioners, RAMOCO INC. and RAM PETROLEUMS INC., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 27, 1981.

I.

QUESTION PRESENTED

May the Secretary of the Interior adopt an interpretation of an Amendment to the Mineral Leasing Act of 1920, 30 U.S.C. § 188(c), which renders the amendment nugatory?

II.

PARTIES

All parties to the proceeding in the Court of Appeals and all lower court and administrative proceedings appear in the caption, except that James G. Watt has been substituted as the Secretary of the Interior pursuant to Supreme Court Rule 40.3 in place of his predecessor, Cecil D. Andrus, who served as Secretary during all periods relevant to this action. Subsequent to initiation of this action in the district court, all interests in federal oil and gas leases of Ramoco Inc. were assigned to Ram Petroleums Inc., a Delaware corporation, which is, in turn, a wholly owned subsidiary of Ram Petroleums Limited, an Ontario corporation. There are no other related corporations to be listed under the provisions of Supreme Court Rule 28.1. The parties hereto shall henceforth be referred to by the same designations as they bore in the district court below.

III.

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IV.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, published at 649 F.2d 814 (1981), appears in the Appendix filed herewith at page 15. The opinion of the District Court, which was not published, appears in the Appendix at page 20. The opinion of the United States District Court for the District of Nevada rendered in a parallel case, *Ram Petroleums Inc. u Andrus*, arising from the same administrative decision was published at 478 F.Supp. 1165 (1979), and appears in the Appendix at page 27. The final administrative decision of the Interior Board of Land Appeals, published at 37 I.B.L.A. 184 (1978), appears in the Appendix at page 23.

IV.

GROUNDS FOR JURISDICTION

Federal jurisdiction existed in the District Court and the Court of Appeals pursuant to the provisions of 28 U.S.C. § 1331(a)(1970) (Federal Question), 28 U.S.C. § 2201 (1970) (Declaratory Judgment) and 5 U.S.C. § 701 (1970) (Administrative Procedure Act).

The judgment of the Court of Appeals for the Tenth Circuit was entered on May 27, 1981, and this Petition for Certiorari is being filed within 90 days of such date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1970).

VI.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article IV, section 3, clause 2 of the United States Constitution provides:

> Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

The relevant section of the Mineral Leasing Act of 1920, 30 U.S.C. § 188(c)(1970), is reprinted in the Appendix at page 35. 43 C.F.R. § 3108.2-1(c)(2)(1979) is reprinted in the Appendix at page 36.

VII.

STATEMENT OF THE CASE

Plaintiffs are affiliated corporations which acquired eleven federal oil and gas leases within the state of Utah. Under the Mineral Leasing Act of 1920, as amended, plaintiffs were required to tender full payment of advance rental to the Bureau of Land Management (BLM) on or before July 1, 1977, in order to avoid "automatic termination" of the leases. 30 U.S.C. § 188(b)(1970). Timely payment was not made.

However, within the twenty day "grace period" provided by 30 U.S.C. § 188(c)(1970) (Appendix, p. 35), plaintiffs tendered full rental and petitioned the Secretary of the Interior for reinstatement of the leases. Under that section reinstatement is to be granted by the Secretary if the circumstances surrounding late payment of rental meets the "justifiable" or "not due to a lack of reasonable diligence" standard of the statute.

The undisputed evidence introduced before the agency established that plaintiffs had given a designated employee detailed instructions regarding rental payment procedures. Part of those procedures required her to examine the lease control book and make all rental payments at least one month in advance of the rental due date. This employee was supervised by more experienced personnel, including plaintiffs' general counsel and land department supervisor. Prior to July 1, 1977, the employee had performed her job thoroughly and accurately, making over 150 rental payments without error.

On at least two separate occasions in June, 1977, in ample time to ensure full payment, plaintiffs' general counsel and plaintiffs' president asked the employee if she had completed payment of all rentals due on July 1. For unknown reasons, the employee informed these supervisors that she had made the payments, when in fact she had not.

Upon receipt of a termination notice from the BLM on July 14, plaintiffs immediately tendered full rental for all the subject leases and filed their petition for reinstatement on July 15. On August 16, 1977, the Utah State Office of the BLM denied the petitions. By decision dated October 11, 1978, two administrative law judges of the Interior Board of Land Appeals (IBLA) upheld the BLM decision over the dissent of a third judge. Appendix, p. 23.

Jurisdiction of the district court was sought by plaintiffs pursuant to 28 U.S.C. § 1331(a)(1970) (Federal Question); 28 U.S.C. § 2201(1970) (Declaratory Judgment); and 5 U.S.C. § 701 (1970) (Administrative Procedure Act).

The basis for the departmental rulings was adherence to a series of cases which interpret the statutory tests in an extremely narrow and inflexible fashion. The "reasonable diligence" test becomes, in the department's view, solely a question of whether mailing of the rental occurred more or less than three days in advance of the due date. The "justifiable" standard is satisfiable only if factors wholly outside a lessee's control (such as death) cause the late payment.

On November 14, 1979, the Federal District Court for the District of Utah, Anderson, J., granted the defendant Secretary's Motion for Summary Judgment. Appendix, p. 20. By decision dated May 27, 1981, the United States Court of Appeals for the Tenth Circuit affirmed the district court decision. 649 F.2d 814. Appendix, p. 15. Both courts noted without enthusiasm the restrictive nature of the departmental interpretation, but decided to "defer" to it.

Simultaneously, however, plaintiff Ram Petroleums Inc. was pursuing its right of appeal in the Nevada District Court as to nineteen Nevada leases affected by the identical IBLA decision. Late payment of the Nevada lease rentals arose out of the same sequence of events as is involved in the instant action. On October 25, 1979, Judge Thompson of the Nevada court granted plaintiff's Motion for Summary Judgment and ordered the Secretary to reinstate plaintiff's leases. *Ram Petroleums Inc. v. Andrus*, 478 F.Supp. 1165 (D. Nev. 1979), Appendix, p. 27. The Secretary appealed to the United States Court of Appeals for the Ninth Circuit, where the case has been argued and a decision is pending.

VIII.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The instant case presents an opportunity for this Court to resolve important federal administrative issues regarding the scope of the Secretary of Interior's discretion, the proper interpretation of a 1970 amendment to the Mineral Leasing Act of 1920 (MLA) and the degree to which the Secretary's discretion must be guided by Congressional intent as opposed to administrative policy or convenience. Such resolution is of substantial importance since the various federal courts which have considered the problem have enunciated conflicting standards and reached directly opposite results. The issue assumes additional importance where, as here, the executive branch's interpretation and implementation of a statute has reversed itself. If "deference" is allowed to be applied in the fashion adopted by the district and circuit courts below, it will allow succeeding administrations to change substantive law without Congressional approval. This Court should not allow a rule of statutory construction to operate in this manner, thus preventing Congress from effectively exercising its Constitutional mandate "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Constitution, art. IV, § 3, cl. 2.

If, on the other hand, this Court emphasises and clarifies the limitations properly inherent in application of the deference principle with respect to Secretarial interpretations of law, it will enhance the ability of Congress to reassert through legislation effective policy control over a wide range of public land management issues. The relationship which this case bears to these issues of separation of powers and the role which its proper resolution can have in maintaining the Constitutionally prescribed balance among the separate branches of government can best be illustrated by focusing on the reasons the Tenth Circuit and Nevada district courts reached opposite conclusions in interpreting the proper application of 30 U.S.C. § 188(c)(1970) to identical facts.

The approach followed by the Nevada court was to give detailed consideration to the events leading up to the 1970 statutory amendment and to the expressed intent of Congress in enacting the legislation. The court examined Congressional reasons for amending the MLA in 1954 so as to add a forfeiture penalty for failure to pay rental. It observed that the "inundation" of private relief bills caused Congress to pass the 1962 amendment to the MLA providing relief for past forfeitures, but not for those occurring subsequent to the legislation. Finally, the court traced the effect which this history had on the drafting of the 1970 amendment.

In dealing with the 1970 amendment itself, the court considered the specific kinds of situations that Congress intended to remedy with its passage and found one which was "almost squarely on point with that outlined in Ram's petition." Appendix, p. 32. The court thus concluded that: "In light of the clear congressional intention to provide relief in the very type of situation now before the Court, the conclusion that the denial of Ram's petition by this IBLA constitutes an abuse of discretion is inescapable." Appendix, pp. 33-34.

In following this procedure, the court was undoubtedly influenced by the fact that the Secretary sponsored the 1970 legislation, his predecessors had advised Congress for years of the need for it, and his Under Secretary provided Congress

with the list of private legislation for which the bill was meant to obviate the need.

Upon passage of the remedial legislation, however, the Secretary delegated responsibility for overseeing implementation of the statute to his newly created Board of Land Appeals. Over the succeeding years that Board developed an increasingly narrow view of the scope of the statute until it had enunciated two hard and fast interpretive rules: the "reasonable diligence" standard of the statute became a "time of mailing" rule, allowing relief only if the rental is mailed at least three days in advance of the due date; the "justifiable" standard came to apply only if circumstances wholly outside the control of the lessee, its employees or agents prevented timely rental payment. Appendix, p. 24.

The Nevada district court determined that if Congress had intended such simplistic rules to apply, it would have phrased its statute accordingly. Instead, the court held that "Such a niggardly interpretation of section 188(c) runs clearly contrary to congressional intent and cannot stand." Appendix, p. 31.

The method of the circuit court in affirming the Utah district court, to the contrary, was to focus primarily on the Secretary's Board's latest interpretation of the statute. The court dealt with legislative concerns only as an aside, and wholly failed to deal with the fact that the Secretary's position (to which it paid such deference) was at sharp odds with his predecessor's position adopted before Congress when he urged passage of the 1970 amendments. Instead of making an independent judicial investigation of Congressional policy expressed in the Act, the court applied the deference principle without considering the threshold concerns of consistency with Congressional intent and conformity with contemporaneous departmental interpretations of that intent.

The result of this cart-before-the-horse legal reasoning was a conclusion that "the Secretary has not so fettered himself

that he cannon 'do equity' as directed by Congress." Appendix, p. 18. The court's deference did not allow it to consider whether the Secretary had, in this case, actually "done equity" as directed by Congress. Another result was the circuit court's finding that:

> The Secretary's narrow interpretation of § 188(c)'s reinstatement standards does obviate the concern that excuses based solely upon employee negligence or misconduct are too easily manufactured and are more subject to fraud than petitions based upon circumstances truly beyond the lessee's control. The Secretary need not embark on a petition by petition search for such fraud but can properly interpret § 188(c)'s mandate in a manner that efficiently precludes the possibility altogether.

Id.

This is, in effect, judicial consent to an administrative agency's having implemented a Congressional grant of discretion by adopting rules which are inflexible, nondiscretionary and rarely permit that discretion to be favorably exercised. It allows the Secretary and his bureaucratic agents to avoid almost any consideration of facts, equities or rational implications arising out of these facts, all in the name of efficiency. It allows the Secretary's Board to deny reinstatement out of an unspecified fear of "fraud" when there was no hint of fraud on the part of the petitioner and when the objective circumstances surrounding the leases and rental payments absolutely preclude the possibility that the fraud feared by Congress could have occurred.[1] It allowed that same Board (which

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[1] The House Report expressed Congressional concern only about: "the advantage that could result from 'intentional' mistakes whereby unethical operators could knowingly underpay or submit rentals late and thereby gain additional time while an oilfield play is developing." H.R. Rep. No. 91-1005, 91st Cong., 2d. Sess. 4, *reprinted in* [1970] U.S. Code Cong. & Ad. News 3002, 3005. The lands involved in the subject leases are such remote wildcat areas that they were never leased prior to plaintiffs' applications. Although preliminary geological and geophysical work was proceeding at

itself has no more contact with the day-to-day operations of BLM lease maintenance and rental payment procedures than does a federal court) to virtually repeal an Act of Congress, all in the name of judicial "deference" to a hypothetical agency expertise which, if it does exist, does not reside in the isolated appeals board which overturned the spirit and original interpretation of the departmental authorities who proposed, sponsored and initially implemented the Act.

In summary, application of the deference principle in the circumstances illustrated by this case was a substitute for thought by the judiciary and a grant of authority by it to the executive which allows that branch of government to avoid thought altogether in performing its administrative functions.

Such a thoughtless approach to lessee rental payment procedures would, of course, be permissible as a matter of law, if a law existed (as it did prior to 1970) that required such an approach. The point is, however, that Congress directed a different approach, one which "is designed to provide a general legislative solution to specific situations now pending before the commitee as private relief bills." H.R. Rep. No. 91-1005, 91st Cong., 2d Sess. 4, *reprinted in* [1970] U.S. Code Cong. & Ad. News 3002, 3005. The circuit court's deference to the agency's interpretation has thus allowed Interior to avoid its statutory responsibility, solely in the name of "efficiency."

The approach of the circuit court to administrative appeals arising out of the Department of Interior is all too commonly followed. Unquestionably, there is considerable support in the language of many of this Court's cases justifying recognition by the circuit court of the proposition that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." Appendix p. 18, *quoting Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969). But

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the time in the area, no drilling or "play" was known to plaintiffs, and had it existed or been known, given the uniform rental applicable to all such noncompetitive leases ($.50 per acre), the activity would have served as additional incentive to ensure timely rental payments, not as a ground for unethical delay.

that oft repeated language has frequently, as in the instant case, been quoted entirely out of the context intended and used by this Court, thus demonstrating the need for clarification of the limits of this principle of statutory construction.

Excellent examples of the proper application of the deference principle are supplied by the two cases cited in the circuit court's opinion. In *Andrus v. Idaho*, 445 U.S. 715 (1980), this Court began its analysis by stating: "In ascertaining the meaning of the relevant language of the Act, it is important to note the circumstances of its adoption in 1894." *Id.* at 727.

After reviewing those circumstances in detail, this Court then noted that the interpretation indicated by legislative history, "has also been the consistent view of the Department of the Interior." *Id.* at 729.

Similarly, in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969) this Court began its analysis by observing that "the fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history." 395 U.S. at 380.

Only after analysing this legislative history and discussing "subsequent legislation declaring the intent of an earlier statute..." *Id.*, did this Court refer to "the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong ...." *Id.* at 381. The Court further noted that the principle is applicable "especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation." *Id.* at 381-82.

To take the "deference" principle out of such contexts and apply it in a situation where it overrides an independent analysis of legislative history and initial administrative interpretation is to grant the executive branch of government the

power to change the law without referral of the issue involved to Congress. Such a grant is inconsistent with the doctrine of separation of powers.

The need to guard against this trend in the area of public land administration is particularly acute, not only because of the Constitutional assignment of power over the public lands to Congress, but also because Congress has recently demonstrated a coherent design to reassert its role in setting land management policy. *See, e.g.*, Federal Land Policy and Management Act of 1976, § 102, 43 U.S.C. § 1701, and the Mining and Minerals Policy Act of 1970, 84 Stat. 1876, 30 U.S.C. § 21(a).

IX.

CONCLUSION

Granting of the writ sought by petitioners will allow this Court to clarify and limit the circumstances in which it is appropriate to apply the principle of judicial deference to administrative construction of statutory provisions. Such clarification will restrain the temptation by administrative agencies to change substantive law by revising or reversing their prior interpretations of Congressional Acts. It will insure that Congressional intent assumes a position of primacy over the deference principle of statutory construction, thus allowing policy over the public lands to be controlled by Congress, not the Secretary, as was expressly intended by the drafters of the Constitution.

Granting of the writ will further allow this Court to correct a substantial misinterpretation of the 1970 Amendment to the Mineral Leasing Act rendered by the circuit court. It will avoid the prospect of a split in the circuits on this issue, and insure that, in the future, the Secretary and his delegates consider applications for reinstatement of terminated oil and gas leases in a fashion which accords with Congressional intent and reduces the need for private relief bills to correct injustices of the kind experienced by petitioners herein.

Respectfully submitted,

Head, Moye, Carver & Ray

By _____

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-1100

RAMOCO INC. and RAM PETROLEUMS, INC.,

Plaintiffs-Appellants,

v.

CECIL ANDRUS, Secretary of the Interior of the United States of America, EDWARD W. STUEBING and DOUGLAS E. HENRIQUES, Administrative Judges of the Interior Board of Land Appeals,

Defendants-Appellees.

Argued and Submitted October 14, 1980.

Dec. 'ed May 27, 1981.

Craig R. Carver (with Teryl R. Gorrell, on the brief), of Head, Moye, Carver & Ray, Denver, Colo. (and with H. Byron Mock and Joel R. Dangerfield of Mock, Shearer & Carling, Salt Lake City, Utah, on the brief), for plaintiffs-appellants.

David C. Shilton (with Dirk D. Snel on the brief), Dept. of Justice, Washington, D.C. (and with Sanford Sagalkin, Acting Asst. Atty. Gen., Washington, D.C., Ronald L. Rencher, U.S. Atty., and Wallace T. Boyack, Asst. U.S. Atty., Salt Lake City, Utah, on the brief), for defendants-appellees.

Before McWILLIAMS, DOYLE and McKAY, Circuit Judges.

McKAY, Circuit Judge.

Plaintiffs received notice on July 14, 1977 that certain of their federal oil and gas leases had been terminated by operation of law under 30 U.S.C.§188(b) because rental payments had not been received on or before July 1, 1977, the date they

were due. As required by the applicable reinstatement provision, *see id.* §188(c), plaintiffs within twenty days after the due date tendered all rentals due and petitioned the Utah State Office of the Bureau of Land Management for reinstatement of the leases, alleging that its failure to make timely payment "was either justifiable or not due to a lack of reasonable diligence on the part of the lessee."[1] The only requirements of the reinstatement provision in issue were the "justifiable" and "reasonable diligence" requirements. The Utah State Office denied the Petitions for Reinstatement, and the Interior Board of Land Appeals affirmed that decision. Plaintiffs then sought relief in federal district court where, on cross-motions for summary judgment, the district court upheld the denial of reinstatement.

The administrative record shows that plaintiffs designated a certain employee to ascertain which rental payments were due, and to type and to mail all rental checks in advance of the due dates. For several months prior to the due date for rental payments on the leases that were eventually cancelled, this employee followed these instructions in a satisfactory manner. Not long before the due date for the cancelled leases, plaintiffs' attorney on one occasion and their president on another asked this employee whether all rental payments that soon would be due had been tendered. The employee responded that all her work was in order. These inquiries were made of the employee sufficiently in advance of the due date so that, had the employee answered truthfully, timely payments could still have been made. Whether intentionally or negligently,[2] however, the employee in fact had not paid the rents when the inquiries were made and did not make them at any time before

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[1] 30 U.S.C. § 188(c) provides in pertinent part as follows:

> Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on [*sic*] or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease if—
>
> (1) a petition for reinstatement, together with the required rental . . . is filed with the Secretary ....

the due date. Plaintiffs first became aware of the nonpayment when they received notices terminating the leases.

The transcripts of BLM and IBLA decisions reveal that the Secretary of the Interior reads § 188(c)'s "justifiable" standard to exonerate only late payments proximately "caused by factors outside the lessee's control," and that the Secretary normally will not consider an argument under § 188(c)'s "reasonable diligence" standard unless the rental payment was mailed "sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail."[2] Record, vol. 1, at 15. Thus, the Secretary's interpretation of "reasonable diligence" and "justifiable" is broad enough to reinstate leases where the government received payments late due only to illness, *Billy Wright*, 29 IBLA 81 (1977); to injury to a key employee, *David Kirkland*, 19 IBLA 305 (1975); to severe winter weather, *Genevieve C. Aabye*, 33 IBLA 285 (1978); or to natural disasters, such as floods or earthquakes, *Fuel Resources Development Co.*, 43 IBLA 19, 21-22 (1979). In contrast, the Secretary has consistently declined to reinstate leases where late payments resulted from errors of the lessee or his employees. *See Fuel Resources Development Co.*, 43 IBLA 19, 21 (1979); *Phillips Petroleum*, 29 IBLA 114 (1977). Consistent with these cases, the IBLA found here that, not being a factor

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[2] Plaintiffs' affidavits submitted with their motion for summary judgment state that the employee's answers did not reflect the true state of her work. The affidavits do not make clear, however, whether the employee's misstatements resulted from deceit or a mistake. In either case, our analysis would be the same.

[3] In support of the second part of the Secretary's position, the IBLA decisions cite 43 C.F.R. § 3108.2-1(c)(2), which provides that "[r]easonable diligence *normally* requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment." (Emphasis added). While plaintiffs in their brief make much of the liberality implied by "normally," it is apparent that the Secretary reads "normally" to suggest no more than that "factors outside lessee's control" which proximately cause any late payment—but not factors within lessees' control, such as negligent or deceptive employees—may permit a finding of "reasonable diligence."

outside the lessee's control, "the inadvertence or negligence of a lessee's employee does not justify reinstatement of a lease terminated for failure to make a timely rental payment." *Id.* at 16.

Plaintiffs charge that the Secretary's narrow interpretation of § 188(c)'s reinstatement standards is arbitrary, capricious, and an abuse of discretion, *see* 5 U.S.C. § 706(2)(A), and that the lease payment procedures which plaintiffs used in this case constitute reasonable diligence and thus justify under § 188(c) the late payments. However, "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong ...." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969). *Accord, Andrus v. Idaho*, 445 U.S. 715, 729, 100 S.Ct. 1450, 1458, 63 L.Ed.2d 739 (1980) (stating that "we have in other cases accorded a considerable deference to the responsible agency's construction of the statute which it administers"). And although the Secretary's interpretation of "reasonable diligence" and "justifiable" is indeed narrow, it is not arbitrary or capricious, and is not an abuse of the discretion granted by § 188(c). The cases noted above indicate that the Secretary has not so fettered himself that he cannot "do equity" as directed by Congress. H.R.Rep.No.1005, 91st Cong., 2d Sess., *reprinted in* [1970] U.S.Code Cong. & Ad.News 3002. Nor has the Secretary failed to note Congress' concern that lessees may seek "the advantage that could result from 'intentional' mistakes whereby unethical operators could knowingly underpay or submit rentals late and thereby gain additional time while oilfield 'play' is developing." *Id.* at 3005. The Secretary's narrow interpretation of § 188(c)'s reinstatement standards does obviate the concern that excuses based solely upon employee negligence or misconduct are too easily manufactured and are more subject to fraud than petitions based upon circumstances truly beyond the lessee's control. The Secretary need not embark on a petition by petition search for such fraud but can properly interpret § 188(c)'s mandate in a manner that efficiently precludes the possibility altogether. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947); 3 K. Davis, Administrative Law

Treatise, 24-28 (2d ed. 1980). In addition, reading "justifiable" and "reasonable diligence" narrowly provides an incentive for lessees to develop procedures which *assure* timely payment.

According the Secretary's interpretation the "considerable deference" it is due, we cannot see that it is arbitrary, capricious, or otherwise not in accordance with law. As applied to the facts of plaintiffs' petition, this interpretation did not allow for reinstatement of plaintiffs' cancelled leases.

AFFIRMED.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

RAMOCO, INC. and RAM PETROLEUMS, INC., Plaintiffs, v. CECIL ANDRUS, Secretary of the Interior of the United States of America, EDWARD W. STUEBING and DOUGLAS E. HENRIQUES, Administrative Judges of the Interior Board of Land Appeals, and L. POLLICK, Chief, Minerals Section, Utah State Office of the Bureau of Land Management, Defendants.	ORDER GRANTING SUMMARY JUDGEMENT FOR DEFENDANTS C-79-0007

This action comes before the court on opposing motions for summary judgment. The case involves a review of administrative action that denied reinstatement of certain oil and gas leases owned by plaintiffs. Plaintiffs request the court to reverse the agency action and order the Secretary of the Interior to reinstate the leases. The court heard oral argument on October 15, 1979, and, after carefully reviewing the administrative record and the briefs submitted, it finds that defendants are entitled to judgment as a matter of law.

Certain oil and gas leases of plaintiffs were cancelled by operation of law when their rental payments were not received before they were due. The reason for the late payments was an error, either intentional or negligent, of one of plaintiffs' employees. Plaintiffs petitioned for reinstatement of the leases

under 30 U.S.C. § 188(b), which requires, *inter alia*, that it be "shown to the satisfaction of the Secretary of the Interior that such failure [to pay timely] was either justifiable or not due to a lack of reasonable diligence on the part of the lessee ...." The petitions were denied by the Utah State Office of the Bureau of Land Management and that decision was affirmed by the Interior Board of Land Appeals.

The court recognizes that it is limited in its review of the agency decision. A reversal would be appropriate only if, considering the whole record, the decision is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706.

With this standard in mind, the court has considered the administrative record and determines that the agency decision should not be reversed. The court is aware of the harsh consequences of the agency action, particularly in light of Congress' intent to soften the impact of the automatic termination statute by enacting the reinstatement provision. There was, however, substantial evidence to support the agency's finding that plaintiffs failed to show that the delay was justifiable or not due to a lack of diligence. An employee of the lessees committed an intentional or negligent error which, in spite of efforts to minimize or prevent such mistakes, caused the failure to make timely payment. The agency attributed the acts of the employee to her employers, the lessees, which cannot be found to be unreasonable or arbitrary in this case considering traditional agency principles. Thus, the conclusion of the agency was supported by substantial evidence and was not arbitrary or capricious.

The situation presented to the court in this case is different than the one presented in *Hiko Bell Mining & Oil Co. u Andrus*, No. C-76-0138 (D. Utah April 4, 1978), wherein this court reversed an agency denial of a petition for reinstatement of certain leases. In that case, the evidence showed that petitioner, a nonlawyer, diligently tried to determine the correct office to send his rental payment, but was cited to an incorrect section of the Code of Federal Regulations. His payment, which would

have been timely had it been correctly addressed, was therefore late in arriving at the correct office. The evidence was overwhelming that petitioner's late payment was justifiable and not due to a lack of diligence. There was virtually no evidence to support the agency decision. In the present case, because of the error of lessees employee, there was substantial evidence to support the decision and the decision was not arbitrary or unreasonable.

Accordingly,

IT IS HEREBY ORDERED that summary judgment is entered for the defendants.

DATED this 14th day of November, 1979.

ALDON J. ANDERSON
United States District Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

RAM PETROLEUMS, INC., & RAMOCO, INC.

IBLA 77-551 and 77-553

Decided October 11, 1978

APPEARANCES: James W. McDade, Esq., of McDade and Lee, Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Ram Petroleums, Inc., and Ramoco, Inc., have appealed from separate decisions of the Nevada State Office (BLM) dated August 8, 1977 (N-12775 *et al.*), and of the Utah State Office (BLM) dated August 16, 1978 (U-32798 *et al.*). These decisions denied petitions for reinstatement of 30 oil and gas leases which had terminated by operation of law when payments of the annual rentals were not received on or before the anniversary dates of the leases.[1]

For all the Nevada leases the anniversary date was July 1, 1977, and the rental payments were not mailed from Toronto, Ontario, Canada, until June 30, 1977, and received by the BLM Nevada office on July 6, 1977. For all the Utah leases the anniversary date was also July 1, 1977. The rental payment for lease U-33482 was postmarked afternoon on June 30, 1977, at Toronto, Ontario, Canada, and not received until well after the due date. The rental payments for the remainder of the Utah leases were not postmarked until after the anniversary date and not received until July 19, 1977.

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[1] The leases involved in these appeals are:
Ram Petroleums, Inc.: N-12775, N-12776, N-12777, N-12778, N-12780, N-12781, N-12782, N-12783, N-12784, N-12785, N-12786, N-12787, N-12788, N-12789, N-12790, N-12791, N-12792, N-12793, N-12871.
Ramoco, Inc.: U-32798, U-32936, U-33473, U-33474, U-33475, U-33476, U-33477, U-33481, U-33482, U-33483, U-33485.

Appellants petitioned the BLM for reinstatement of these leases contending the payments were filed late due to circumstances beyond their control, *i.e.*, the sudden failure of an employee to perform her duties to mail timely the rentals, coupled with her subsequent false assurances to a corporate executive that the duties had been performed and the rentals had been timely mailed. The State Offices did not find either that appellant had exercised reasonable diligence or that the failure to pay timely was justifiable, so as to qualify the leases for reinstatement.

[1] An oil and gas lease terminated for failure to pay annual rental on or before the anniversary date may be reinstated only if the failure to pay timely was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1970). Reasonable diligence requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 C.F.R. 3108.2-1(c)(2). We note that for part of the leases at hand mailing a rental payment 1 day before its due date does not constitute reasonable diligence. *David R. and Darla L. Smith*, 33 IBLA 63 (1977); *Edward Malz*, 33 IBLA 22 (1977); *Adolph Muratori*, 31 IBLA 39 (1977); *Nevada Western Oil Co.*, 30 IBLA 379 (1977); *Louis Samuel*, 8 IBLA 268 (1972), *aff'd*, *Samuel v. Morton*, Civ. No. CV-74-112-EC (August 12, 1974), *aff'd*, *Maisano v. Morton*, Civ. No. 39720 (E.D. Mich., October 12, 1973). Nor for the remaining leases does mailing the payment after it is due constitute reasonable diligence. *Apostolos Paliombeis*, 30 IBLA 153 (1977); *Bobbie Arnold*, 24 IBLA 352 (1976). Thus, appellants cannot show that failure to make timely payment was not due to a lack of reasonable diligence on their part. We then turn to whether appellants have demonstrated justifiable delay.

[2] Failure to pay rental timely is justifiable only when it is caused by factors outside the lessee's control, which were the proximate cause of the failure. *Adolph F. Muratori, supra; Constitution Petroleum Co., Inc.*, 25 IBLA 319 (1976). Appellants expound at length on appeal as to the extenuating circumstances which they assert justify reinstatement. A particular

employee who was responsible for mailing rental checks on their leases in this area and who had satisfactorily performed the required procedures in the past, in this instance failed, for whatever reason, to take the required measures to send in the rental payments in good time. The employee's supervisor specifically inquired whether the payments had been made and she responded they had been paid, when in fact they had not. Later, a similar inquiry by the corporations' president evoked the same untrue response. Appellants allege that this inquiry was made of the employee sufficiently in advance of the rental due dates so that timely payment could still have been made if the employee had responded truthfully that she had not performed her duties. Appellants point out that they have no control over the veracity of their employees. Appellants argue, in essence, that they had done all they could under the circumstances to comply with the regulations, and that they had acted in a way that satisfies one or both of the criteria for reinstatement.

We find no merit in this argument. Although appellants claim they did all they could to assure timely payment, we do not find that their reliance on the employee's statement is sufficient action to classify the subsequent failure to pay as justifiable. Appellants hired and supervised this employee and established the company procedures by which rental payments were to be made. It is axiomatic that appellants bear the responsibility and the consequences for the action or inaction of their employees. They could easily have gone one step further and actually verified if rental payments had been sent rather than merely accepting the assurances of this employee. A simple checking of the account records to substantiate that the payments were made would have been a more prudent course of action. We find no basis to stray from our earlier rulings that the inadvertence or negligence of a lessee's employee does not justify reinstatement of a lease terminated for failure to make a timely rental payment. *Shell Oil Company*, 30 IBLA 290 (1977); *Phillips Petroleum Company*, 29 IBLA 114 (1977); *Samuel J. Testagrossa*, 25 IBLA 64 (1976); *Monturah Co.*, 10 IBLA 347 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the decisions of the State Offices are affirmed.

EDWARD W. STUEBING
Administrative Judge

I concur:

DOUGLAS E. HENRIQUES
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

While a corporation is ordinarily responsible for the acts of its employees, appellant has alleged that (1) a supervising attorney, (2) the president of the corporation, and (3) Robert Opekar all checked to determine whether the rentals had been paid. Each of these inquiries would have disclosed the facts in time for timely payments, if the employee had not lied. I feel that reasonable diligence has been shown under *Elwyn C. Hale,* Las Cruces 06310 (August 27, 1968). That case, which involved a secretarial error, was a basis for enactment of 30 U.S.C. § 188(c). *Lone Star Producing Company,* 28 IBLA 132, 144-46 (1976) (dissent). The payments here were made well within the 20-day period for reinstatement. I would reinstate the leases.

JOSEPH W. GOSS
Administrative Judge

UNITED STATES DISTRICT COURT
D. NEVADA

Civ. No. 79-0005 BRT.

October 25, 1979

RAM PETROLEUMS, INC., *Plaintiff,*

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CECIL ANDRUS, Secretary of the Interior of the United States of America, EDWARD W. STUEBING and DOUGLAS E. HENRIQUES, Administrative Judges of the Interior Board of Land Appeals, *Defendants.*

McDonald, Carano, Wilson, Bergin, Bible, Frankovich & Hicks, John J. Frankovich, Reno, Nev., Head, Moye, Carver & Ray, Craig R. Carver, Denver, Colo., for plaintiff.

B. Mahlon Brown, U.S. Atty., Shirley Smith, Asst. U.S. Atty., Reno, Nev., for defendants.

ORDER

BRUCE R. THOMPSON, District Judge.

This case seeks review of a decision of the Interior Board of Land Appeals (IBLA) denying the plaintiff's petition for reinstatement of terminated oil and gas leases. 30 U.S.C. § 188. The matter is before the Court on the government's motion alternatively to dismiss or for judgment on the pleadings and the plaintiff's cross motion for summary judgment.

The plaintiff, Ram Petroleums, Inc., formerly held a number of oil and gas leases on public lands lying in Nevada.[1] Those leases terminated automatically when the Bureau of Land

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[1] Those leases, which form the subject matter of this suit, may be identified by the following BLM parcel numbers: N-12775 through N-12778, inclusive; N-12780 through N-12793, inclusive; and N-12871.

Management (BLM) did not receive the annual rentals on the day they fell due. See 30 U.S.C. § 188(b). Ram then sought administrative reinstatement of its leases pursuant to 30 U.S.C. § 188(c). That statute authorizes the Secretary of the Interior to reinstate automatically terminated leases if the required rental is tendered within twenty days of termination, together with a petition demonstrating that the lessor's delinquency was either not due to a lack of reasonable diligence or justifiable.[2] Although timely, Ram's petition was denied by the Acting Chief of Lands and Mineral Operations of the BLM. His decision was affirmed on appeal to the IBLA.

Ram contends that the Secretary's rejection of its proffered excuse was arbitrary and capricious, amounting to an abuse of discretion. The excuse offered in its petition, as set forth in the IBLA decision, is as follows:

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[2] "Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease if—

(1) a petition for reinstatement, together with the required rental, including back rental accruing from the date of termination of the lease, is filed with the Secretary; and

(2) no valid lease has been issued affecting any of the lands covered by the terminated lease prior to the filing of said petition. The Secretary shall not issue any new lease affecting any of the lands covered by such terminated lease for a reasonable period, as determined in accordance with regulations issued by him. In any case where a reinstatement of a terminated lease is granted under this subsection and the Secretary finds that the reinstatement of such lease will not afford the lessee a reasonable opportunity to continue operations under the lease, the Secretary may, at his discretion, extend the term of such lease for such period as he deems reasonable: Provided, That (A) such extension shall not exceed a period equivalent to the time beginning when the lessee knew or should have known of the termination and ending on the date the Secretary grants such petition; (B) such extension shall not exceed a period equal to the unexpired portion of the lease or any extension thereof remaining at the date of termination; and (C) when the reinstatement occurs after the expiration of the term or extension thereof the lease may be extended from the date the Secretary grants the petition."

> "Appellants [plaintiff here] expound at length on appeal as to the extenuating circumstances which they assert justify reinstatement. A particular employee who was responsible for mailing rental checks on their leases in this area and who had satisfactorily performed the required procedures in the past, in this instance failed, for whatever reason, to take the required measures to send in the rental payments in good time. The employee's supervisor specifically inquired whether the payment had been made and she responded they had been paid, when in fact they had not. Later, a similar inquiry by the corporation's president evoked the same untrue response. Appellants allege that this inquiry was made of the employee sufficiently in advance of the rental due dates so that timely payment could still have been made if the employee had responded truthfully that she had not performed her duties. Appellants point out that they have no control over the veracity of their employees. Appellants argue, in essence, that they had done all they could under the circumstances to comply with the regulations, and that they had acted in a way that satisfies one or both of the criteria for reinstatement."

No hearing was held on Ram's petition and the government does not now contest its veracity. The sole question before the Court is the legal one of whether the Secretary, acting through the IBLA, abused its discretion in concluding that employee error and mendacity do not make a tardy rental payment excusable as being either "not due to a lack of reasonable diligence" or "justifiable."

[1, 2] At the outset, it should be noted that the government's challenge to the jurisdiction of this Court is unavailing. Whatever the merits of the government's argument with respect to 28 U.S.C. § 1361, jurisdiction clearly lies under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* "There is ... a presumption of judicial review under the APA unless

there is clear and convincing evidence that Congress intended to foreclose review of a final agency action either by a specific statute or by committing action to agency discretion." *Standard Oil Co. of California v. F.T.C.*, 596 F.2d 1381, 1384 (9th Cir. 1979). Although a given action may involve the exercise of agency discretion, it remains reviewable except "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971) (citation omitted).

[3] No statute specifically prohibits judicial review of decisions denying reinstatement of terminated oil and gas leases. To the contrary, 30 U.S.C. § 226-2 which prescribes the time for commencement of actions contesting decision of the Secretary involving oil and gas leases strongly suggests that judicial review is intended. *Maisano v. Morton*, Civ.No. 38720 (E.D. Mich., filed October 12, 1973); cf. *Samuel v. Morton*, Civ.No. 74-1112-EC (C.D.Cal., filed Aug. 26, 1974). In providing that it must be shown "to the satisfaction of the Secretary" that the default was not due to a lack of reasonable diligence or was otherwise justifiable, section 188(c) vests the Secretary with a measure of discretion in acting on reinstatement petitions. From this it does not follow, however, that the statute is drawn in such broad terms that courts are left no standard by which to measure the lawfulness of the agency's action. The statute itself erects certain standards when it conditions reinstatement on a showing by the petitioner that the default was "not due to a lack of reasonable diligence" or "justifiable." The legislative history, implementing regulations and judicial and administrative decisions all lend added meaning to those standards. Plainly there is "law to apply" and jurisdiction thus exists under the APA. Accord *Santor v. Morton*, 383 F.Supp. 1265 (D.Wyo. 1974); *Maisano v. Morton*, supra.

[4, 5] The IBLA took the position in this case that Ram's failure to have paid the rentals on the date due could only have been shown to have been "not due to a lack of reasonable diligence" had Ram shown that the payments had been mailed three days before they fell due. *Ram Petroleums, Inc. and*

Ramoco, Inc., 37 IBLA 184, 186 (1978); see 43 C.F.R. 3108.2-1 (c)(2). It also rejected Ram's claim that the delay was "justifiable" for the reason that employee error and dishonesty do not constitute circumstances beyond the lessee's control. *Ram Petroleums, Inc. and Ramoco, Inc.*, 37 IBLA at 186-87. Such a niggardly interpretation of section 188(c) runs clearly contrary to congressional intent and cannot stand.[3]

Section 188 has been amended several times since its original enactment as section 31 of the Mineral Leasing Act of 1920. Prior to 1954 the failure of an oil and gas lessee to pay the annual rental when due did not terminate the lease. Even if the lessee wished to abandon the lease and attempted to do so by not paying the rentals, the lease did not terminate and rentals continued to accrue. The absence of forfeiture provisions was at odds with prevailing state and private practice. As a result, there were a number of lessees who were unaware of the substantial liabilities that were accruing in favor of the federal government. At the same time, the federal policy in favor of encouraging exploration and development was being thwarted by uncertainty as to which lands were available for leasing. H.R.Rep.No.2238, 83d Cong., 2d Sess., *reprinted in* [1954] U.S.Code Cong. & Admin. News, pp. 2695, 2701; see S.Rep.No. 2165, 87th Cong., 2d Sess., *reprinted in* [1962] U.S.Code Cong. & Admin. News, pp. 3236, 3237. Accordingly, section 188 was amended to provide for automatic termination upon failure to pay the rentals by the date due. Pub.L. 83-555, 68 Stat. 585.

The 1954 amendments made no provision for administrative reinstatement of terminated leases, and the Department of the Interior took the position that it was powerless to grant such relief. This led to inequitable results, particularly in cases in which the delay was short, the default inadvertent, or the payment timely but nominally deficient. Congress quickly

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[3] In its brief the government represents that the "reasoning behind these [IBLA] decisions has been affirmed in several cases," citing two unpublished decisions, *Samuel v. Morton* and *Maisano v. Morton*. Inasmuch as copies of those decisions were not appended, copies were requested of the government attorney. *Samuel v. Morton* was dismissed on the grounds that the suit was not timely under 30 U.S.C. § 226-1.

found itself inundated with private relief bills seeking reinstatement of terminated leases. In 1962 section 188 was again amended to grant the Secretary authority to reinstate terminated leases, but the amendment only applied to leases terminated before the date of its passage. Pub.L. 87-822, 76 Stat. 943; see S.Rep.No.2165, 87th Cong., 2d Sess., *reprinted in* [1962] U.S.Code Cong. & Admin. News, p. 3236.

The problems which led to the adoption of the 1962 amendments persisted. Legislation granting the Secretary authority to grant reinstatement as to future terminations passed both the Senate and the House in 1967, but the differences among the various bills were never resolved by committee. S.R. 1367, 90th Cong., 1st Sess. (1967); H.R. 7915 and H.R. 7940, 90th Cong., 1st Sess. (1970). In 1970, section 188 was finally amended to its present form, granting the Secretary prospective authority to reinstate terminated leases if the default is found not to have been due to a lack of reasonable diligence or justifiable. Pub.L. 91-245, 84 Stat. 206. The stated purpose of these amendments is to "enable the Secretary to do equity and [to] obviate the need for Congress to continue to consider many private bills for the relief of individual lessees." H.R.Rep.No. 91-1005, 91st Cong., 1st Sess., *reprinted in* [1970] U.S.Code Cong. & Admin. News, p. 3002. By requiring the petition for reinstatement to be filed within twenty days of termination, the need for certainty as to the status of federal oil and gas leases which prompted the 1954 amendments to section 188 in the beginning was also fulfilled. See generally *Reinstatement of Oil and Gas Leases: Hearings on H.R. 7915 and H.R. 7940 Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. (1967) (remarks of Mr. Cavanaugh).

The kinds of situations that Congress intended to remedy with the passage of the 1970 amendments to section 188 find frequent illustration in the legislative proceedings regarding the various private laws that had been passed reinstating terminated oil and gas leases. The situation of Elwyn C. Hale, Oil and Gas Lease Las Cruces 06310, Private Law 90-294, is almost squarely on point with that outlined in Ram's petition.

The anniversary date of Mr. Hale's lease was April 30, 1965. The rental payment was not made until May 10, 1965. His explanation for the late payment was as follows:

> "In April of this year, I began arrangements to drill a new well on the property. I obtained the necessary drilling bonds and the necessary permits from the owners of the potash rights in the surface and from the Bureau of Land Mangement. Drilling operations were commenced on April 29, 1965 and I have expended $8,974.37 on the drilling operations since that time. When drilling operations are commenced, the term of the lease is automatically extended to 2 years. While I was in New Mexico arranging the necessary permits and getting the drilling operations underway, the due date for advance rental payment (May 1) came up. As is customary when I am away, all routine business operations are carried on by my secretary who occupies my office with me. My present secretary had only been with me a couple of months, and misunderstood my instructions and the lease and assumed that the commencement of drilling operations was all that was necessary to keep the lease in effect. Unfortunately, the annual rental payment of $250 was overlooked."

Reprinted as an appendix to S.Rep.No. 91-205, 91st Cong., 1st Sess. (1969), Serial Set 12834-1. If anything, Ram's position is stronger than Mr. Hale's, for according to the petition filed on its behalf, the employee was expressly asked if she had made the required payments and assured her employer that she had.

[6] During argument the government attorney was questioned as to the policy reasons for the position taken by the IBLA in this case. Inasmuch as the need for certainty as to the status of oil and gas leases is amply served by the twenty-day time limitation on the filing of petitions for reinstatement, none could be adduced. In light of the clear congressional intention to provide relief in the very type of situation now

before this Court, the conclusion that the denial of Ram's petition by the IBLA constitutes an abuse of discretion is inescapable.

In consideration of the premises,

IT HEREBY IS ORDERED that the government's motion for judgment on the pleadings or dismissal be, and it hereby is, denied.

IT FURTHER IS ORDERED that the plaintiff's motion for summary judgment be, and it hereby is, granted.

The case is remanded to the Department of the Interior with instructions to reinstate the plaintiff's leases upon payment of the rentals due.

REPRINT OF
30 U.S.C. § 188(c)

Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease if—

(1) a petition for reinstatement, together with the required rental, including back rental accruing from the date of termination of the lease, is filed with the Secretary; and

(2) no valid lease has been issued affecting any of the lands covered by the terminated lease prior to the filing of said petition. The Secretary shall not issue any new lease affecting any of the lands covered by such terminated lease for a reasonable period, as determined in accordance with regulations issued by him. In any case where a reinstatement of a terminated lease is granted under this subsection and the Secretary finds that the reinstatement of such lease will not afford the lessee a reasonable opportunity to continue operations under the lease, the Secretary may, at his discretion, extend the term of such lease for such period as he deems reasonable: *Provided*, That (A) such extension shall not exceed a period equivalent to the time beginning when the lessee knew or should have known of the termination and ending on the date the Secretary grants such petition; (B) such extension shall not exceed a period equal to the unexpired portion of the lease or any extension thereof remaining at the date of termination; and (C) when the reinstatement occurs after the expiration of the term or extension thereof the lease may be extended from the date the Secretary grants the petition.

REPRINT OF
43 C.F.R. § 3108.2-1(c)

(c) Reinstatement. (1) Except as hereinafter provided, the authorized officer may reinstate a terminated lease which has been or is hereafter terminated automatically by operation of law for failure to pay on or before the anniversary date the full amount of rental due, provided that (i) such rental was paid or tendered within 20 days thereafter, and (ii) it is shown to the satisfaction of the authorized officer that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, and (iii) a petition for reinstatement, together with the required rental, including any back rental which has accrued from the date of termination of the lease, is filed with the appropriate office within 15 days after receipt of Notice of Termination of Lease due to late payment of rental. The Notice of Termination will be sent by certified mail, return receipt requested. Notices of Termination will not be sent to lessees whose leases terminated prior to May 12, 1970. Lessees whose leases terminated prior to May 12, 1970, must file petitions for reinstatement with the appropriate office by close of business on December 31, 1971. Such petitions are subject to all other appropriate provisions of this section.

(2) The burden of showing that the failure to pay on or before the anniversary date was justifiable or not due to lack of reasonable diligence will be on the lessee. Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. The authorized officer may require evidence, such as post office receipts, of the time of sending or delivery of payments.

(3) Under no conditions will a terminated lease be reinstated if (i) a valid oil and gas lease has been issued prior to the filing of petition for reinstatement affecting any of the lands covered by that terminated lease, or (ii) the Federal oil and gas interests in the lands have been withdrawn or disposed of, or have otherwise become unavailable for oil and gas leas-

ing; however, the authorized officer will not issue a new lease for lands covered by a lease which terminates automatically until 90 days from the date of termination.

(4) Reinstatement of terminated leases is discretionary with the Secretary.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-381

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAMOCO, INC. and RAM PETROLEUMS, INC.,
PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR
OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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QUESTION PRESENTED

Whether the refusal of the Secretary of the Interior to reinstate 11 federal oil and gas leases terminated because of late payment of lease rentals was an abuse of discretion and contrary to Section 31(c) of the Mineral Leasing Act of 1920, 30 U.S.C. 188 (c), when that Section provides for reinstatement only where it is shown "to the satisfaction of the Secretary" that late payment was "justifiable" or not caused by the lessee's "lack of reasonable diligence."

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-381

RAMOCO, INC. and RAM PETROLEUMS, INC.,
PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR
OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15) is reported at 649 F.2d 814. The opinion of the district court (Pet. App. 20) is not reported. The opinion of the Interior Board of Land Appeals (Pet. App. 23) is reported at 37 I.B.L.A. 184.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1981. The petition for a writ of certiorari was filed on August 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Ramoco, Inc. and Ram Petroleums, Inc. (Ramoco) are affiliated corporations which owned 11 federal oil and gas leases in Utah. On July 14, 1977, they received notice that these leases had terminated by operation of law under Section 31(b) of the Mineral Leasing Act of 1920, 30 U.S.C. 188(b), because rental payments had not been received on or before July 1, 1977, the date they were due (Pet. App. 15-16). Petitioners thereupon tendered the late rental payments and petitioned the Utah Office of the Bureau of Land Management (BLM) for reinstatement of the leases. Under a 1970 Amendment to Section 31 of the Mineral Leasing Act of 1920, Pub. L. No. 91-245, 84 Stat. 206, leases terminated because of late payment may be reinstated where "it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee * * *." 30 U.S.C. 188(c) (Pet. App. 35).[1]

Petitioners attached two affidavits of corporate officers to their petition for reinstatement. These affidavits recited that petitioners had designated an employee to ascertain which rental payments were due, and to mail rental payments in advance of the due date. This employee satisfactorily mailed rental payments from February 1977 to June 1977. Not long before the due date for the terminated leases, each of the two corporate officers asked the employee whether all rental payments that soon would be due had been tendered. She responded that her work was

[1] The same section requires that the rental payment be tendered within 20 days of the due date, and forbids reinstatement if a valid intervening lease has been issued on lands covered by the terminated lease. These requirements are not at issue here.

in order, when in fact she had not mailed payments for the leases at issue here. Payments were not mailed until one day before the due date for one lease and after the due date for the others.

The petition for reinstatement was denied by the BLM Utah Office on August 16, 1977. By decision dated October 11, 1978, the Interior Board of Land Appeals (IBLA) upheld the decision of the Utah Office (Pet. App. 23). The majority opinion noted (Pet. App. 24) that "reasonable diligence," as defined in Interior's regulations, required mailing of rental payments sufficiently in advance of the due date to account for normal delays in the collection, transmittal and delivery of mail. See 43 C.F.R. 3108.2-1(c)(2) (Pet. App. 36). This standard had not been met, since one payment was mailed only one day before the due date and the others after the due date. The majority further stated (Pet. App. 24-25) that failure to pay on time is justifiable only when caused by factors outside the lessee's control. The petitioners had not shown that the failure to pay was outside their control, since they supervised the employee at fault and could have checked account records to see if payments had been made rather than rely on her oral assurances. The IBLA's majority found "no basis to stray from our earlier rulings that the inadvertence or negligence of a lessee's employee does not justify reinstatement of a lease terminated for failure to make a timely rental payment" (Pet. App. 25; citations omitted). Administrative Judge Goss dissented (Pet. App. 26).

Ramoco sought review in the United States District Court for the District of Utah, alleging that the Department of Interior's refusal to reinstate the leases was arbitrary, capricious, an abuse of discretion, and not in accordance with law. The administrative record, consisting chiefly of the two affidavits,

was submitted, and the matter decided on cross motions for summary judgment. The district court found there was "substantial evidence to support the agency's finding that plaintiffs failed to show that the delay was justifiable or not due to a lack of diligence" (Pet. App. 21).

The court of appeals affirmed the district court on May 27, 1981 (Pet. App. 15). The court of appeals noted (Pet. App. 17-18) that the Department of Interior's action was consistent with a long line of IBLA decisions denying reinstatement where late payment results from employee errors, rather than factors beyond a lessee's control. The court found (Pet. App. 18) that this consistent agency interpretation comported with the intent of Congress to permit reinstatement in limited circumstances without opening up an opportunity for unscrupulous lessees to make " 'intentional' " mistakes to gain time where an oilfield " 'play' " is developing (Pet. App. 18, quoting from H.R. Rep. No. 91-1005, 91st Cong., 2d Sess. 4 (1970)). The court, finding no reason to depart from the practice of according substantial deference to the agency's construction of a statute it administers, affirmed the decision not to reinstate Ramoco's leases.

A related case is awaiting decision in the United States Court of Appeals for the Ninth Circuit. *Ram Petroleums, Inc.* v. *Andrus*, 478 F. Supp. 1165 (D. Nev. 1979), appeal pending *sub nom. Ram Petroleums, Inc.* v. *Watt*, No. 79-4886 (9th Cir., argued June 10, 1981). Nineteen leases in Nevada owned by Ramoco were terminated at the same time as the Utah leases. Ramoco petitioned to the BLM Nevada State Office, attaching the same affidavits as here. That office denied the petition, and IBLA affirmed in the same opinion that affirmed the decision of the Utah BLM office (Pet. App. 23). The United States District Court for the District of Nevada declared

that the denial of Ramoco's petition was an abuse of discretion (Pet. App. 27-34). The government thereupon took the pending appeal to the Ninth Circuit.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court.

Petitioners primarily contend that Interior's refusal to reinstate the leases contravenes the legislative intent of the 1970 Amendment to Section 31(c) of the Mineral Leasing Act of 1920, 30 U.S.C. 188 (c). That amendment gave the Department of the Interior discretionary authority to reinstate leases that, due to late payments, had terminated by operation of law. Petitioners claim that the Interior Department has interpreted its authority too narrowly by its general practice of refusing reinstatement where failure to pay on time is due to the error of an employee.

This claim was properly rejected by the court of appeals. It is hard to imagine any broader grant of discretion to an agency than that contained in 30 U.S.C. 188(c). That subsection states that the necessary justification or due diligence must be "shown to the satisfaction of the Secretary," in which case the Secretary "may" reinstate the lease. One cannot draw from this language an explicit congressional direction to grant reinstatement in a particular type of case, such as where late payment is due to employee error.

Petitioners rely heavily on the district court's analysis in *Ram Petroleums, Inc.* v. *Andrus*, 478 F. Supp. 1165 (D. Nev. 1979), appeal pending *sub nom. Ram Petroleums, Inc.* v. *Watt*, No. 79-4886 (9th Cir., argued June 10, 1981) (Pet. App. 27). The district

court in that case noted that one purpose of the 1970 Amendment was to lessen the need for Congress to consider large numbers of private bills for the relief of persons whose leases had terminated due to late payment. The district court fixed upon one example of such a bill, which became Priv. L. No. 90-294, 82 Stat. 1409, for the relief of Elwyn C. Hale. This private law was summarized in an appendix to a report of the Under Secretary of the Interior, which was printed along with the Senate committee report on the 1970 Amendment. See S. Rep. No. 91-205, 91st Cong., 1st Sess. 10 (1969). The summary noted that Mr. Hale, whose lease terminated due to late payment, had commenced drilling on his lease a day before the rental payment was due, expending $8,974.37 on the project. While Hale was away, his secretary failed to mail the rental payment because she assumed that commencement of drilling was all that was needed to keep the lease in effect.

The Nevada district court erred by treating the summary of the Hale case as if it were a congressional directive to grant reinstatement in all similar cases (see Pet. App. 32-33).[2] In fact, neither the House nor Senate committee reports on the 1970 Amendment even mentions this private law. Nor do the reports suggest that all of the private bills brought to Congress' attention would constitute precedents to guide the Interior Department.

The Hale case summary was properly disregarded by the court below, in favor of statements from the committee reports, such as the following (H.R. Rep. No. 91-1005, 91st Cong., 2d Sess. 4 (1970)):

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[2] The district court also failed to note that Ramoco's case was not similar to Hale's. Hale had commenced drilling on his lease. This gave Hale a strong equitable claim to reinstatement which Ramoco does not have, since no drilling has occurred on any of Ramoco's leases in Nevada or Utah.

> A reinstatement may be made by the Secretary only after he is fully satisfied that the mistake was justifiable or not due to lack of reasonable diligence on the part of the lessee. The Committee expects the Secretary of the Interior to examine carefully each petition for reinstatement and to adjudicate favorably only those cases where it is clearly shown that the failure was, as indicated above, either justifiable or not due to lack of reasonable diligence. The committee is fully aware of the advantage that could result from "intentional" mistakes whereby unethical operators could knowingly underpay or submit rentals late and thereby gain additional time while an oilfield "play" is developing. However, S.1193 as amended provides the Secretary with ample authority to determine the merits of each petition for reinstatement, and reinstatement need not be made until the Secretary is fully satisfied.

As the court of appeals found (Pet. App. 18), the Secretary's insistence that petitions be based upon circumstances beyond the lessee's control reduces the potential for " 'intentional' mistakes." [3] It also "provides an incentive for lessees to develop procedures

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[3] Petitioners protest (Pet. 8) that no fraud or intentional mistakes were involved in this case. To support this, however, they rely entirely on facts which are outside the record presented to the agency and the lower courts (see Pet. 8 n.1).

The brief record here is typical of records developed in reinstatement cases. Petitioners' suggestion that the Department of Interior should affirmatively determine the presence or absence of fraud would entail a vast expansion in the scope of reinstatement proceedings. As the court of appeals pointed out (Pet. App. 18), there is nothing in 30 U.S.C. 188(c) that forbids application of a rule that effectively precludes the possibility of fraud while maintaining a simple and efficient administrative procedure.

which *assure* timely payment" (Pet. App. 18; emphasis in original).

The Interior Department's standards for determining when late payment is either justifiable or not due to a lack of reasonable diligence are thus consistent with legislative intent, especially in light of the broad grant of discretion contained in 30 U.S.C. 188(c).[4] Petitioners do not contend that they meet these standards. Further review of petitioners' claim that employee error should excuse late payment is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioners' suggestion (Pet. 7, 10, 11) that the Department of Interior has changed its interpretation of the statute is unsupported. The "beyond the control of the lessee" standard was spelled out shortly after passage of the 1970 Amendment. See *Louis Samuel*, 8 I.B.L.A. 268, 274 (1972). It has been followed ever since. See *Monturah Co.*, 10 I.B.L.A. 347, 348-349 (1973); *James Donoghue*, 25 I.B.L.A. 280, 281-282 (1976); *Samuel J. Testagrossa*, 25 I.B.L.A. 64, 65 (1976); *Phillips Petroleum*, 29 I.B.L.A. 114, 117-118 (1977). There is no evidence that Interior argued for a different standard before the Congress which enacted the 1970 Amendment or that, if it did, Congress agreed.

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